Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

Workplace Safety and Insurance Appeals Tribunal

Quarterly Production and Activity Report

July 1 to September 30, 2011

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Production Summary

- At the end of the third quarter 2011 the active inventory totalled 4,204 appeals. This is approximately 9% higher than the active inventory at the beginning of 2011.
- Incoming appeals numbered 1162, of these 1008 were appeals from WSIB decisions and 154 appellants advised they were ready to proceed to hearing following a period of inactive status.
    - This compares to 894 new appeals and 189 reactivated appeals recorded in the second quarter of 2011
    - In the 3rd quarter of 2010 the Tribunal recorded 866 new appeals and 132 reactivations.
    - In 2010, the weekly average of hearing-ready appellants was 56. For Q3-2011, the weekly average of hearing-ready appellants is 57. This figure excludes cases reactivated from inactive status.
- Dispositions numbered 906. This includes 300 dispositions in the pre-hearing areas resulting from dispute-resolution (ADR) efforts and 606 after-hearing dispositions; of the after-hearing dispositions, 575 followed from Tribunal decisions.
- At the end of Q3-11, the inactive inventory was 2,746 cases (at the end of Q2-11, the inactive inventory was 2,809 cases).
- In Q3-11, 87% of final decisions were released within 120 days. In 2010, 84% of final decisions were released within 120 days.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the third quarter of 2011, the notice inventory included 1,435 dormant cases, the active inventory totalled 4,204 cases, and the inactive inventory totalled 2,746 cases.

Production Tables and Charts

A. Active Inventory end of Quarter

Period	Active Inventory
Q1-2010	3867
Q2-2010	3864
Q3-2010	3879
Q4-2010	3860
Q1-2011	3892
Q2-2011	4016
Q3-2011	4204

B. Incoming Appeals

Period	Incoming Appeals
Q1-2010	1036
Q2-2010	1022
Q3-2010	998
Q4-2010	994
Q1-2011	1108
Q2-2011	1083
Q3-2011	1162

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
Q1-2010	1018	326	692
Q2-2010	943	319	624
Q3-2010	915	313	602
Q4-2010	1031	323	708
Q1-2011	993	287	706
Q2-2011	992	308	684
Q3-2011	906	300	606

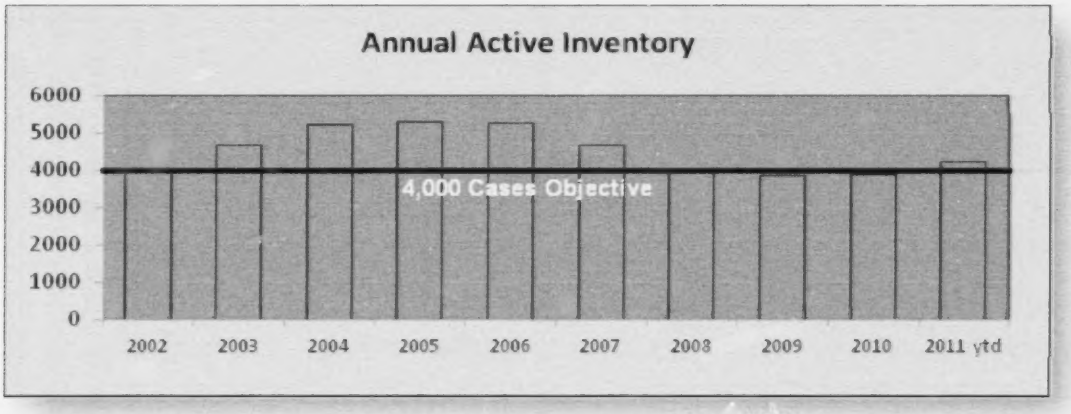
D. Inactive Inventory

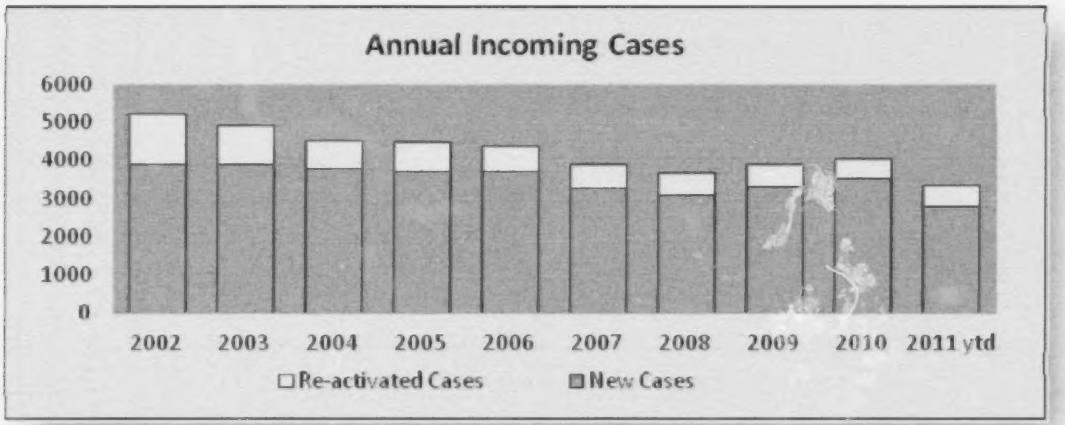
Period	Inactive Inventory
Q1-2010	3320
Q2-2010	3273
Q3-2010	3214
Q4-2010	3158
Q1-2011	2963
Q2-2011	2809
Q3-2011	2746

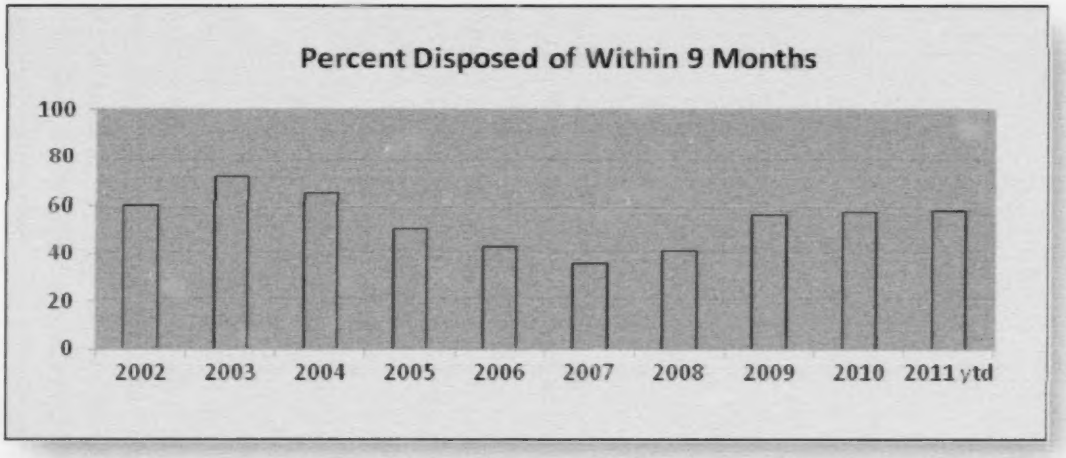
E. Notice of Appeal (Dormant cases)

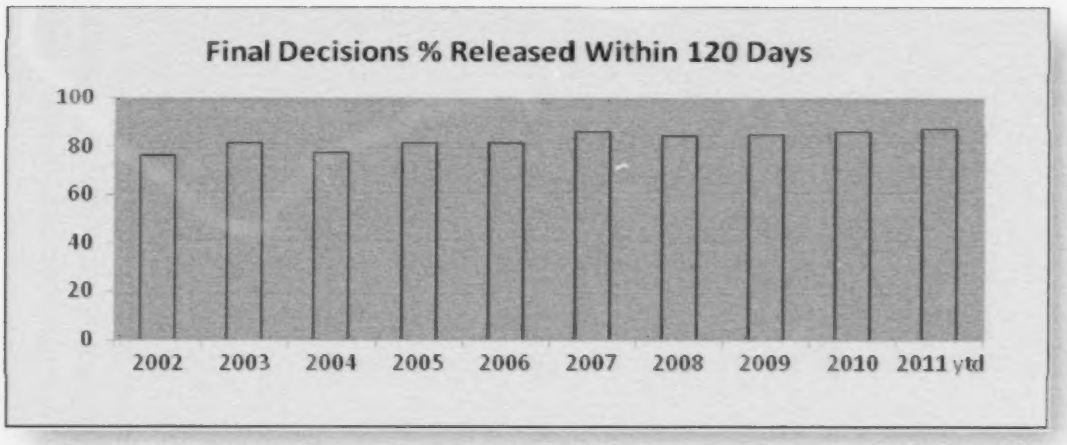
Period	Total Dormant	Change from previous quarter
Q1-2010	1185	-16
Q2-2010	1267	82
Q3-2010	1335	68
Q4-2010	1317	-18
Q1-2011	1400	83
Q2-2011	1367	-33
Q3-2011	1435	68

F. Production Charts: Annual from 2002 up to the end of the current quarter






Percent Disposed of Within 9 Months
100
80
60
40
20
0
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011 ytd


Final Decisions % Released Within 120 Days
100
80
60
40
20
0
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011 ytd

Judicial Review Activity

Third Quarter 2011

The status of applications for judicial review involving the Tribunal for the third quarter of 2011 is set out below. Only those judicial reviews where there was some significant activity during the quarter are listed. Most applications for judicial review are handled by General Counsel and the lawyers in the Tribunal Counsel Office.

1. Decisions 774/09 (April 21, 2009) and 774/09R (August 20, 2009)

The plaintiff was the manager of an apartment building. His regular hours were 8 to 5, Monday to Friday, but he was on call outside of those hours. As a result of a flood in the parking garage, a plumber was called. The following day, while checking to see if the flooding problem was over, the plaintiff fell and injured himself.

Although the plaintiff at first claimed benefits from the Board, he subsequently decided to bring an action. The defendant commenced a section 31 application to determine whether the right of action was taken away under the Act.

The Vice-Chair held the right of action was taken away. Although the plaintiff was not scheduled to be on duty at the time of the accident, he was a worker in the course of his employment when the accident occurred. He fell within the requirements for "time, place and activity" in Board policy. When he checked the flooding situation this was consistent with his workplace practices, which involved coming back on duty whenever there was a situation requiring him to perform his job duties.

The plaintiff commenced an application for judicial review. Plaintiff's counsel originally filed an affidavit with their materials. Following negotiations between counsel, it was agreed to remove the affidavit. The Tribunal has filed its factum. It is expected that this case will be heard in Ottawa in early 2012.

2. Decisions 1976/99I (November 30, 1999), 1976/99 (December 12, 2002), and 1976/99R (September 2, 2005)

The worker was granted entitlement on an aggravation basis for benefits from March 1991 until February 1992 for fibromyalgia. The worker did not seek medical treatment from November 1991 until September 2004. She then sought additional benefits for the period after 1992. The hearing Panel found the worker was suffering from regional myofascial pain, rather than fibromyalgia, and denied the appeal.

A different Vice-Chair in the reconsideration decision held the hearing Panel may have been mistaken in making this determination, and also that this distinction in diagnosis was not sufficient to disqualify the worker from entitlement. However, he also held that even if the worker suffered from fibromyalgia, she would still not be entitled to benefits because it was not clear the worker continued to suffer from a work injury, the medical reporting did not relate her ongoing condition to work, there was significant discrepancy in the medical reporting, and her allegation of significant worsening from 1991 to 1994 suggested another intervening cause of her disability.

The worker commenced an application for judicial review. However she was represented by an unlicensed paralegal from Quebec, who did not have the status to represent her at Divisional Court. The Tribunal served its Record of Proceedings. The worker served her factum. Her factum was improper and in the Tribunal's view should not have been accepted by the Ottawa Divisional Court. The Tribunal raised this with the Ottawa Divisional Court, and on October 12, 2010 Justice Linhares deSousa directed that the worker's factum be returned to the worker, with instructions that the worker must seek authorization before a single justice of Divisional Court to file her factum.

On March 4 2011 the worker's motion to be allowed to file a 55 page factum was heard by Justice Smith in Ottawa. Her request was not granted, but the Court granted her 60 days in which to file a 45 page factum. The Tribunal was granted the right to file a 45 page factum in reply.

Both the worker and the Tribunal have served and filed their factums. At the end of this quarter the Tribunal was waiting for the judicial review to be scheduled. This judicial review will be heard in Ottawa.

3. Decisions 756/89L (December 11, 1989) and 756/89LR (October 3, 1990)

In Decision 756/89L, the worker applied for leave to appeal a decision of the former WCB Appeal Board dated November 27, 1978. The Appeal Board decision denied the worker entitlement to benefits for a bilateral knee disability, which he claimed was related to a work accident in 1977. The Appeal Board did not accept that the worker had an accident as he alleged. The Appeal Board denied the worker's reconsideration requests on December 14, 1979; August 15, 1980; October 27, 1983 and September 5, 1984. Two reviews of the worker's file by the Ombudsman did not support that the worker's disability was related to a work accident.

Applying the statutory tests, in its December 1989 decision the Tribunal Panel denied leave, holding there was no substantial new evidence and no reason to doubt the correctness of the Appeal Board's decision.

The worker applied to reconsider Decision 756/89L. The same Panel released Decision 756/89LR on October 3, 1990, which denied the reconsideration.

Over the succeeding twenty years, the worker made a series of further applications for reconsideration. In October of 2010 he commenced an application for judicial review.

As some of the original appeal materials were missing, the Tribunal made strenuous efforts to re-create the file in order to compile a Record of Proceedings. After several months and consulting numerous sources, the Tribunal filed as complete a Record of Proceedings as it could with the Divisional Court.

The worker filed his factum. At the end of the quarter the Tribunal was preparing its responding factum. This judicial review will be heard in London.

4. Decisions 1110/06 (November 2, 2006), 1565/08I (July 25, 2008), 1565/08 (May 13, 2010), and 1565/08R (February 9, 2011).

The worker was injured in June 1990. He was granted an 18% NEL. He was granted a FEL sustainability award at D1 in 1992. He was also granted a FEL supplement while he participated in a vocational rehabilitation program. He was undergoing a retraining program when he was involved in a motor vehicle accident in 1993, forcing him to quit the program. The supplement ended when he withdrew from the program.

At R1 in 1994 the worker was granted a FEL based on earnings which assumed he had been able to complete the training program.

In 1997 the Board ruled that the worker had recovered from the 1990 accident and his ongoing back problems were actually the result of a pre-existing condition. The worker's entitlement was revoked retroactive to September 1990.

The worker appealed to the Tribunal. He claimed he was entitled to a 100% FEL award as he was unable to earn anything in suitable and available employment as a result of the 1990 work accident.

In Decision 1110/06 the Tribunal determined the worker's pre-existing condition had been asymptomatic at the time of the 1990 injury, so the work injury was a significant factor contributing to the worker's ongoing impairment. The Panel held the worker had ongoing entitlement, that he had a permanent impairment, and that the entitlement to benefits he had at the time of the 1997 Board decision should be restored. The Board was directed to reinstate the worker's benefits and determine his past and ongoing benefits.

Following Decision 1110/06, in 2007 the Board made a new FEL determination. The Board found the worker was only partially disabled because of his work injury, and his inability to work was due to the 1993 motor vehicle accident. The Board reinstated the NEL, but did not grant a full FEL. The Board awarded a smaller FEL starting in 1993 as it determined he could work as a civil engineering technician. The worker appealed to the Tribunal again.

In Decision 1565/08I the Panel spent the first day of hearing considering the role of a person who appeared at the hearing with the worker and who characterized herself as a "facilitator." Following a lengthy discussion, it was decided that this person would characterize herself as a "friend" of the worker. As a friend she would qualify under the exemption for a representative as set out in By-Law 4 passed pursuant to the *Law Society Act*. However the Panel brought the circumstances of the case to the attention of the Tribunal Chair.

When the hearing reconvened the Panel considered the worker's arguments that he was totally disabled before his motor vehicle accident, and hence he was entitled to a higher FEL.

In Decision 1565/08 the Panel found the worker was not totally permanently disabled before the motor vehicle accident. The motor vehicle accident had a significant impact on the worker. The Panel found that the worker's inability to earn beyond the level

determined by the Board was because of the motor vehicle accident. As a result the Panel upheld the worker's D1 and R1 FEL award as determined by the Board.

However at the R2 date the Board had found the worker would have been able to earn more, and hence have a lower FEL. The Panel allowed the worker's appeal on that issue, finding his earning capacity would not have increased. Thus the worker was entitled to a partial FEL commencing in 1993. The Panel also confirmed the Board's NEL determination.

In Decision 1565/08R a different Vice-Chair denied the worker's application to reconsider Decision 1565/08, finding the threshold to reconsider had not been met.

The worker commenced an application for judicial review of Decisions 1565/08 and 1565/08R. The worker is self-represented. The precise arguments which the worker intends to make are not yet apparent but the Notice of Application for Judicial review contains a myriad of allegations of breaches of natural justice, bias, and decisions made on no evidence. The Notice of Application also alleges that the second Panel was barred from making certain findings in light of the conclusions in the earlier decision, Decision 1110/06.

In light of the allegations in the Notice of Application and pursuant to its usual practice, the Tribunal asked the worker to order the transcripts of the Tribunal hearings to be included in the Record of Proceedings. The worker refused. The Tribunal ordered the transcripts itself and filed a Record of Proceedings.

The worker brought a motion for an order to remove the transcripts from the Record, and to remove many of the materials pertaining to Decision 1110/06. The motion was heard in September 2011 by Madam Justice Swinton, who allowed the worker to have a friend present in the courtroom for assistance. However, Justice Swinton indicated that the worker should speak for himself.

Following oral argument by the worker and Tribunal Counsel, Justice Swinton dismissed the worker's motion, accepting the Tribunal's arguments that, in the light of the allegations contained in the Notice of Application, the transcripts and materials from the prior appeal are properly included in the Record of Proceedings. Costs in the cause were awarded to the Tribunal.

At the end of the quarter the Tribunal was waiting for the worker to serve his factum.

5. Decision 62/11 (August 22, 2011)

In Decision 62/11, the Vice-Chair denied the worker's appeal for full LOE benefits subsequent to April 1, 2008. She also denied the employer's cross-appeal for SIEF.

Counsel for the worker served the Tribunal with a notice of appeal, which she filed in the London Divisional Court.

The Tribunal wrote to the worker's counsel to point out there is no appeal from a Tribunal decision by virtue of section 123(4) of the WSIA.

At the end of the quarter the Tribunal was monitoring the situation to see if the worker would attempt to proceed with the appeal.

6. Decision 701/10 (June 18, 2010)

In 2007 a gas fitter was performing a service call at a residence which required removing a decommissioned natural gas standpipe. A gas leak resulted in an explosion, killing the resident of the home and injuring the gas fitter (the Applicant). The Applicant commenced an action against a gas company, and the company which the gas company retained to provide service calls for the clients of the gas company. The gas company and service company brought an application seeking an order that the right to sue was taken away because the Applicant was a worker under the Workplace Safety and Insurance Act.

The issue was whether at the time of the injury the Applicant was a worker or an independent operator of the service company. After considering the appropriate tests and applying the evidence of the nature of the employment relationship, the Vice-Chair found the Applicant was a worker. The Vice-Chair was persuaded by the evidence showing the degree of supervision and control over the Applicant and the work that was done, the small chance of profit or loss, the absence of indicia of a business enterprise, the fact the Applicant was not free to hire help, and that he worked exclusively for one company on a full-time basis. Consequently the right of action was taken away.

The Applicant commenced an application for judicial review. Surprisingly, the Applicant failed to serve the Tribunal with the notice of application. This is the first time in its twenty-five year history where a judicial review of a Tribunal decision has proceeded to be heard without notice being given to the Tribunal. The Divisional Court decision was released on September 20, 2011. The Tribunal only discovered the case had been heard by the Divisional Court two weeks after the Court had released its decision.

As it turned out, the judicial review was dismissed. The Divisional Court unanimously found the Vice-Chair's conclusions were grounded in and supported by the evidence. It held that there was

> "no error in law and no misapprehension of the facts in the tribunal's reasons...the tribunal's review and analysis of the facts was transparent and intelligible, and the conclusions were consistent with the prevailing jurisprudence and the tribunal's policy as applied in 'right to sue' situations. The decision falls within the range of possible and acceptable outcomes that are defensible with regard to the facts and the law."

General Counsel has written to the parties to advise that the Tribunal is a party to a judicial review of one of its own decisions, and it was entitled to notice of this application for judicial review. He advised that the Tribunal would be entitled to notice of any further proceedings that arise out of the judicial review, such as an application for leave to appeal.

7. Decision 3164/00 (December 18, 2000) and Decision 3164/00R (March 28, 2001)

The worker was a baker. She injured her back in 1994. She was paid total benefits for about a month until she returned to work, and then for a recurrence for a further seven months. In 1997 she was granted entitlement for a right elbow disability arising out of her job duties.

She appealed for entitlement for a FEL and further vocational rehabilitation arising out of the back injury. She also appealed ongoing entitlement for the right elbow condition. Finally she appealed for entitlement for fibromyalgia, which she alleged arose out of either the back or the elbow injury.

The Vice-Chair granted entitlement to a FEL and vocational rehabilitation assistance for the back injury. He denied entitlement for fibromyalgia and the right arm/elbow.

On reconsideration the worker submitted additional medical documentation in support of her claim for fibromyalgia, but the Vice-Chair found it was insufficient to warrant re-opening the appeal. The worker made a number of subsequent reconsideration requests which did not meet the threshold to be assigned for review by another panel or vice-chair.

In January of 2011 the worker retained new counsel and commenced an application for judicial review. A concern about the timeliness of this application has been raised with counsel for the worker. In May 2011 the worker's counsel asked if the Tribunal would consent to adjourn the judicial review while the worker pursued a further reconsideration. The Tribunal agreed. In May 2011 the worker submitted a new reconsideration application. At the end of the quarter the reconsideration was being processed.

8. Decisions 1509/02 (February 2, 2004); 1509/02R (September 27, 2006); 2021/07E (October 30, 2007) and 2021/07ER (July 22, 2009)

Two sisters were suspended at the same time for smoking in a non-smoking area at work in 1999. Sister #1 reported an accident within a few hours of returning after her suspension. Sister #2 reported an accident later that day, before the suspension took effect.

Sister #1's claim was denied by the Board. Her appeal to the Tribunal was dismissed (Decision 1384/03). She brought an application for judicial review. On April 6, 2005 the Divisional Court unanimously dismissed the application for judicial review. The Court stated, "In our view, the Tribunal carefully reviewed the evidence and gave reasons for its decision. The decision it reached on the basis of the evidence was not patently unreasonable."

However, Sister #2's claim had been allowed by the Board. The employer appealed to the Tribunal. A Panel of the Tribunal allowed the employer's appeal, reversing initial entitlement for the worker (Decision 1509/02). Sister #2 commenced an application for judicial review in April 2004.

Following discussions with her former counsel, in November 2002 it was agreed that the judicial review application would be adjourned to allow the worker to pursue an application to reconsider Decision 1509/02.

In her reconsideration application the worker alleged the Panel had failed to consider that she had suffered a recurrence of a 1992 injury. Decision 1509/02R was released on September 27, 2006. In that decision the Tribunal found that although the worker had raised a cross-appeal in Decision 1509/02, the worker had not raised entitlement on the basis of a recurrence of the 1992 injury as an issue in that cross-appeal. Consequently, there was no error in Decision 1509/02 and the application for reconsideration was denied.

However, the Vice-Chair in Decision 1509/02R noted that it was still open to the worker to bring an appeal on the recurrence issue to the Tribunal, though it would be necessary to make an application to extend the time to appeal that issue.

The worker retained new counsel, and commenced an application to extend the time to appeal the Board decision. In Decision 2021/07E, the worker's application to extend the time to appeal the issue of recurrence in the June 4, 2001 ARO decision was denied.

The worker commenced an application to reconsider Decision 2021/07E. In Decision 2021/07ER, released July 22, 2009, the Tribunal allowed the reconsideration and granted an extension of time to appeal the recurrence aspect of the ARO Decision.

The Tribunal hearing on the recurrence was heard in October 2010. Decision 2021/07I was released on December 13, 2010. This decision granted the worker's appeal on the basis that her pain in 1999 was a recurrence of the 1992 injury. The worker was given four weeks to decide whether to also ask the Tribunal to address the period of entitlement for benefits for the recurrence.

The worker confirmed that she did not want to pursue this matter further.

The judicial review is still adjourned. The worker's representative has stated that the judicial review will now be abandoned, and the Tribunal is waiting for the worker to file a notice of abandonment.

Recent Decisions

Third Quarter 2011

Paralegals and the Exemption for Canadian Registered Safety Professionals

Decision No. 386/09I is one of the first cases to consider the provisions in By-Law No. 4 of the Law Society of Upper Canada (LSUC) allowing specified professionals to provide legal services without a licence in certain circumstances. It concluded that the Canadian Registered Safety Professional (CRSP) in issue could not represent the client in this appeal.

By-Law No. 4, s. 30(1)(7) provides that an individual may provide legal services without a licence where (i) the individual's profession or occupation is not the provision of legal services or the practice of law; (ii) the individual provides the legal sevices only occasionally; (iii) the legal services are provided as ancillary to the carrying on of his/her profession, and (iv) the individual is a member of a specified profession. All four requirements must be met.

Prior to the hearing, the individual asked the LSUC about her status. The LSUC declined to decide this. It advised that, rather than being "exempt" from licensing, CRSPs were "permitted" by the By-law to provide occasional advocacy services. The LSUC had not defined "occasional" or "ancillary." The question did not relate to an individual's status but applied to the specific "occasional advocacy services." The LSUC expected the Tribunal to adjudicate whether a representative was providing an occasional and/or ancillary legal service in the specific case.

Based on the LSUC letter, the "permission" to appear is with respect to the particular legal service, which must be carried on "as ancillary" to the other professional work. In this case, the representation was not "supplemental" or "supportive" of any duties the individual was providing as a CRSP in other contexts. Another staff member was providing other CRSP services to the client and had transferred the file to this individual to handle the appeal. The Panel concluded that s. 30(1)(7)(iii) did not provide an avenue for registered safety professionals to become, in effect, unlicensed paralegals, by developing practical experience in handling appeals and then becoming dedicated experts who provide only legal services and no other services on particular files.

Traumatic Mental Stress and Board Policy

Decision No. 483/11I found that the worker met the criteria in s. 13(5) for traumatic mental stress, but the Panel requested submissions from the Board concerning the interpretation of the Board's traumatic mental stress policy. The worker was an educational assistant with a school board who developed depression following an unfounded allegation that she had struck a child. She was suspended while under investigation and was ultimately exonerated. The medical evidence established that it was the allegation, rather than the suspension and investigation, which was the principle cause of the depression.

The Panel was satisfied that the unfounded allegation was a sudden and unexpected event which was objectively traumatic under s. 13(5). It also met the average worker test, as an allegation of physical assault of a child, with the possible criminal implications, would be reasonably and objectively traumatic to the average worker. It was not clear whether the accident was covered by Board policy, however. While portions of the

policy seemed inclusive, other parts of the policy appeared to suggest that it should be interpreted narrowly in a way which might be inconsistent with s.13 (5) e.g. by requiring that a traumatic event must involve a threat to physical well-being. While Tribunal cases initially read the policy broadly, recent cases have taken a narrower interpretation. Before ruling under s.124, the Panel asked the Board to make submissions on the interpretation of the policy and whether it was consistent with s. 13(5), which does not seem to be limited to physical trauma.

The Board submitted that it is not a requirement under the policy that sudden and unexpected events involve actual or implied threats to physical well-being, although generally there will be such a threat. Also, the policy allows entitlement for psychological conditions other than post traumatic stress disorder, so long as the condition falls within an Axis 1 diagnosis in accordance with DSM IV. Situations not reflected in the examples in the policy may be allowed so long as the statutory and policy requirements are met.

The Panel concluded that the policy was consistent with the WSIA and that the worker was entitled to benefits. In reaching this conclusion, the Panel indicated that it preferred the broader interpretation of the policy in earlier Tribunal decisions.

Charter and Human Rights Code Issues Raised for the First Time in Reconsiderations

In *Decision No. 2363/09R* the Vice-Chair accepted that there was a breach of natural justice at the hearing since the worker was precluded from providing submissions on one aspect of the case. The Vice-Chair found that this would not change the result because *Decision No. 2363/09* denied the worker's appeal on four grounds and the procedural irregularity only related to one ground. Therefore the threshold test which must be satisfied in a reconsideration request was not met. The worker argued that they would have raised a *Human Rights* or *Charter* issue had they not been precluded from providing submissions on one aspect of the case.

The Vice-Chair did not accept this argument. The Tribunal's Practice Direction "Procedure When Raising a Human Rights or Charter Question" indicates that notice must be provided to the Attorney General of Ontario and Canada no later than 60 days before a scheduled hearing. This is consistent with s. 109(2) of the Ontario *Courts of Justice Act* which provides that if a party fails to give notice of a *Charter* issue in accordance with that section, the law shall not be adjudged to be invalid or inapplicable or the remedy shall not be granted. The Vice-Chair held that a *Charter* or *Human Rights* issue should have been identified prior to the original hearing and given that the worker had competent representation there was no justification to depart from the procedures in the *Practice Direction*. Raising these issues for the first time on a reconsideration was not appropriate.

The worker representative argued that under the Tribunal's inquisitorial mandate, the Panel had an independent obligation to raise potential *Human Rights* and *Charter* issues. The Vice-Chair rejected this, stating that the authority to order an investigation is not a power that should be exercised as a substitution for proper preparation by any party's representative. The investigative mandate should be exercised if the Panel could not have reached a reasonable and defensible decision because of the lack of crucial evidence and submissions on an issue that was not before it at the time of the hearing. This was not the situation in this case.

Non Economic Loss (NEL) Ratings and Repetitive Strain Injuries

Decision No. 2353/10 recently considered a challenge to the use of the Board's "Adjudicative Advice: Permanent Impairment (NEL) Rating Guideline for Upper Extremity Repetitive Strain Injuries (RSI)". The Adjudicative Advice document explains that it was adopted because the AMA Guides' assessment process for repetitive strain injuries is not generally "viable or realistic." The Guides indicate assessments should be performed after 6-8 hours of work in order to assess range of motion (ROM). They also provide for a zero NEL if ROM is not reduced. To avoid this, the Board guidelines rate physical findings (0-3%); history (0-1%); treatment (0-2%) and activities of daily living (0-3%), for a maximum rating of 9% for the upper extremity or 5% for the whole person.

Decision No. 2353/10 agreed with prior Tribunal cases which upheld the Adjudicative Advice document, but limited its use to situations where there was no reduction in ROM. Since the worker's right arm tenosynovitis did cause reduced ROM, the worker was entitled to a rating under the AMA Guides, including ratings for sensory loss and loss of pinch and grip strength. The NEL rating was referred back to the Board to conduct on the basis of the Tribunal's findings of clinical and medical restrictions.

WSIAT
October 2011